United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

75-7450

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

DAILY MIRROR, INC.,

Plaintiff-Appellant

vs.

NEW YORK NEWS, INC., HARRY (HENRY) GARFINKLE, UNION NEWS CO., INC., AMERICAN NEWS CO., INC., and ANCORP, INC.,

Defendants-Respondents.

B
P/S

APPELLANT'S PETITION FOR REHEARING: FOR REINSTATEMENT OF DECISION AND ORDER OF THIS COURT OF NOVEMBER 19, 1975; FOR RESUBMISSION OF THE MERITS TO A NEW PANEL OF JUDGES, IN THE UNUSUAL PRESENCE OF THIS COURT'S OPINION OF APRIL 1ST, OF 1976 AS SET FORTH HEREIN: OR, IN THE ALTERNATIVE, FOR THIS COURT'S CERTIFICATION OF A STATED QUESTION, AS IF, OF AND FOR A DIVIDED COURT, TO THE UNITED STATES SUPREME COURT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DAILY MIRROR, INC.,

Plaintiff-Appellant,

-vs-

NEW YORK NEWS INC., HARRY GARFINKLE, AMERICAN NEWS CO., INC., UNION NEWS COMPANY INC. and ANCORP, INC.,

Defendants-Respondents.

----------x

Petitioner hereby applies to the Court for leave to serve and file a petition for a rehearing in excess of 15 pages in view of the unusual condition.

Firstly, petitioner did not get the opinion until the 8th of April, 1976, although filed by the Court on the first. Consequently, petitioner did not have sufficient time to properly edit the petition so as to reduce its size.

Furthermore, there are most unusual circumstances on this appeal, as appears. This Court allowed adversaries a 90 page answering brief in response to petitioners' brief of a permitted 83 pages.

Application for Leave to Serve Oversized Petition

Wherefor, leave is requested to file the annexed petition.

Respectfully submitted,

Robert W Farrell

s/Robert W. Farrell
ROBERT W. FARRELL
Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

DAILY MIRROR, INC.,

Plaintiff-Appellant,

- vs - 75-7450

NEW YORK NEWS INC., HARRY GARFINKLE, AMERICAN NEWS CO., INC., UNION NEWS COMPANY INC. and ANCORP, INC.,

Defendants-Respondents.

----------X

APPELLANT'S PETITION FOR THE FOLLOWING RELIEF:

(a) For statutory rehearing with

(b) Prior reinstatement of this Court's prior Order of November 19, 1975, and

(c) For resubmission of the merits to a new panel of Judges of this Court in the unusual presence of this Court's Opinion of April 1st, 1976 in self-reversal, of prior Bench;

(d) In the alternative, for this Court's certifying to the Supreme Court, a stated Question, as set forth below, as if, of, and for a divided court.

TO THIS HONORABLE COURT:

The Petitioner, Daily Mirror, Inc., plaintiff-appellant herein, respectfully alleges and shows, by leave of the Court:

That petitioner in the unusual presence of a divided Court, as will appear, requests relief of a correspondingly unusual form, appropriate thereto, as above set forth:

That, on November 19, 1975, this Court (Panel: Feinberg, Gurfein, and Mansfield, CJJ), after fully hearing adversary counsel of defendant NEWS Inc. and its motion to dismiss appeal, and/or to limit its scope of review to the District Judge's exercise of discretion, decided to deny from the Bench, in most sweeping manner, evidencing their full prior study of the motion papers, separately, and together, the respective requests for such relief by movant; therewith, at the same time suggesting that appellant need not be heard with any opposition. Appellant obediently abstained.

On that argument, Circuit Judge Gurfein came forward with the following vital, and central, point of law:

Addressing himself to adversary, he, for the unanimous Bench, substantially declared himself:

> Counsel does have a point, The District Judges, by simultaneously deciding the claim of bias, and for dismissal for lack of prosecution and granting summary judgment, before plaintiff had opportunity below to submit on the merits, left plaintiff at a disadvantage.

And, the Bench also indicated that procedurally whether appeal is taken from the default judgment or from the order denying the motion to vacate it, following only within a matter of a few days, was of little legal moment.

Petitioner submits, that in any event, the authorities forbid any appeal taken from a default judgment, as we show herein.

This Court's opinion, at the outset reads most pertinently:

> "On January 4, 1971, plaintiff corporation commenced publication of a tabloid newspaper, the Daily Mirror, designed to compete with the Daily News. ALMOST FROM ITS INCEPTION, the Mirror ENCOUNTERED DIFFICULTIES IN DISTRIBUTING NEWPAPERS TO NEWSTANDS." (Emphasis added)

Later, most significant reference is made in the Opinion's footnote, No. 4, that the affidavits, filed by plaintiff, on June 27, 1975, were

> "the first to deal with the merits of the summary judgment."

It is made most obvious, inferentially, by said Opinion, that those "merits" of a 90 million dollar action, stood virtually uncontested, certainly in all their new sworn force -- showing the Mafia-related defendants (p. 27, main brief), on concerted endeavors to

"drive plaintiff out of business
by impeding the distribution of
its newspaper";

being produced in a $500,000 modern newspaper plant, publicly so financed (p. 23), and thus a ready and able competitor of the defendant, News, Inc., in an undisputed monopoly market, dominated by this giant, defendant News, Inc., and assisted by four giant-co-defendants with such common objective; who, themselves, in prior, proven, collusive, wholesale newspaper industry deals, had been found guilty by this Court, on affirmance of the Federal Trial Court (SDNY) below (See Opinion (70 C 577) of "DIRTY TRICKS", IN RESTRAINT OF TRADE, (p.32)).

In its main brief, petitioner declared (p.3), with reverse demand for summary judgment in appellant's favor, that defendants

"....have failed to substantially
dispute or deny the sufficient direct
evidence, furnished by plaintiff's
affidavits of merits...."

It is true, that, on the November 19, 1975 hearing, the presiding Circuit Judge, Feinberg, did allow that the decision would be "without prejudice" to renewal upon the main hearing of the appeal; but that followed an eleventh-hour production of a Supplemental affidavit of counsel, which,

the Panel had not, apparently, had the chance to read, before convening. However, petitioner's attorney did rise, preliminarily, with leave of the Bench, on point of order, to declare, that the said affidavit contained eleven bold misstatements of the record on appeal, and that he was ready to furnish a bill of particulars therefor, if challenged. Adversary counsel remained mute in that presence, and then proceeded to make his own main argument.

Petitioner submits that the added words of "without prejudice" appended to absolute denial, after Court's full deliberation, must be deemed to have allowed only for anything <u>new</u>, that movant might later offer, to compel alteration of earlier Bench's decision, of so sweeping a denial. Attached is the exchange of correspondence, covering that hearing of November 19th in two now material respects.

Respondent spent many pages of its 90-page Answering Brief, addressing itself, over again, to the Motion to Dismiss this appeal; but that Brief, and adversary upon the Argument, produced nothing new, or additional by way of facts, or points, or grounds to justify a request for alteration of that sweeping decision and Order of November 19, 1975, or to warrant any alteration, leastwise a reversal.

Petitioner submits, therefore, that this new Bench of April 1, 1976, has thus overruled a coordinate Panel; a practise, which the Court certainly does not, and cannot, in normal course of its judicial operation, countenance. Such reversal was all the more grave a development, because it opened the door to the condition, of plaintiff's now being twice denied its day in Court; and wherein denial of due process is the only legal argument and genuine issue on any aspect of this appeal, as petitioner raised in its Notice of Appeal, and in its Notice of Motion to set aside the default judgment; or worse, on motion for summary judgment on an attorney's affidavit only (barred by Section 56, FRCP), or still worse, on a dismissal for lack of prosecution, on a recused Judge's own motion; and all at a time when

(a) opposing counsel were not objecting to grant of more time to petitioner-plaintiff for answering papers; and

(b) plaintiff was awaiting the necessarily preliminary disposal of its bias claim, filed against the Trial Judge, as statute authorizes, to be first determined; followed by a

(c) a judgment, without prior three-day notice to plaintiff, entered in the Clerk's Office below, on June 11, 1975, though absolutely pre-requisite for this case, of a surprise grant of judgment, under Section 55(b)(2) FRCP, as a matter of due process. (Sonas Corp. v. Mitsubishi (1974, DC Mass. 61 FRD 644; this notice omission is held fatal to the judgment: Meeker v. Rigley, 324 F(2) 269; Serveretti v. Rodriguez, 252 F(2) 290.)

Thus, petitioner submits, that the conversion of these fundamental issues of constitutional import -- withholding a recusal decision, while judicially making still further hostile dispositions on the main case under his judicial custody, into one of an exercise of discretion, -- castrates the substance, and elevates form above substance. That comes to petitioner, with a shock, even as petitioner experienced also, in the Court below in that final disposition.

Petitioner submits that this appeal, like its case below, suffered a tortuous submission, rooted in a disregard of the supreme case law applicable, with contumacious and corrupt approaches to the respective tribunals, and so confronting this Court, by adversaries, in their endeavors to win, at all costs!

Prior to the hearing of this appeal, petitioner's counsel had orally been repeatedly reminded by adversary, that this plaintiff's efforts below, and in this Court, were

a waste of time; and that became particularly, and shamelessly, vocal in conjunction with the required Conference, held earlier in September 1975, with the Staff Counsel of this Court in his Chambers; and which that record shows, was treated with a contempt by defendants' counsel, and so duly noted by Mr. Fensterstock, this Court's representative thereon. We quote, by excerpt annexed from petitioner's letter to him, dated November 5, 1975.

Petitioner calls attention to the corrupt and fraudulent and contumacious approaches to the Trial Court, below, and, to which, appellant had already made reference (pp. 13, 17, 53, 69-70, U.S. v. Homer, 149 F Supp) in its Main Brief, and again, in turn, to this Court, as follows:

(a) 11 specific instances of adversary counsel's misstatements of the record on appeal in its 11-th hour "supplemental" affidavit, used in this Court on the November 19th argument of motion to dismiss this appeal;

(b) 37 material instances of fraudulent misstatements of the record on appeal in the Answering Brief of defendant News, accompanied by 13 instances of silent treatment given to vital parts of the record on appeal, to enable adversary to make the said 37.

(Petitioner's solemn formal motion to strike Answering Brief, duly referred to this Panel, remains undecided.)

It is now an undisputable fact, that these five defendants, each a major factor in the newspaper distribution industry, have, throughout, postured and acted, in both Courts, in concert and in unison.

That began with adversaries' numerous critical delays of, and resistances to, our prosecution of the action below, and which (p.9), in both courts, have been undeniedly falsely attributed to petitioner; and in the present Opinion of April 1, 1976 is utilized as ostensible justification, for reviving a sterile history (1971-1973), (part of which was the unmentioned <u>five judicial shifts of the case below to other District Judges on Court's own motion</u> (p.10), and a further year's delay, due to unified adversaries' retreat to the Bankruptcy Court, (pp 10-11).

Petitioner holds that that matter of the first two years' delay had already its full and accepted (p. 8) explanation, confessed by petitioner, as having been due to handicapped inability to retain counsel, after economic loss suffered at the hands of defendants; and from which, this Court, certainly, should not allow malefactor defendants to benefit; and because adversary is estopped by its having repeatedly requested the Court below, that more time be given for answering affidavits (p. 10), and after obtaining

their own extensions granted to them. (In Opinion, (p.2), the Court erroneously credits adversary with compliance with the date set of May 5, 1975 for serving motion for summary judgment, when in fact, adversary received on its request, extension of that first date.)

As this appeal stands now, the acts of each defendant since 1973 are the adopted acts of all. Not only have the co-defendants of the News Inc. failed to observe this Court's time requirements for submission of Briefs; they have also contemptuously failed to submit any actual Briefs, on this appeal, though financially collectible parties-defendant; and counsel for these co-defendants, abstained further, as well, from participation on Argument.

Nonetheless, they physically presented their faces to the Court; and particularly ROY COHN, Esq.; who also had, below, written his private ex parte letter to the Trial Judge, Frankel -- not discovered by petitioner until 17 days after its transmission in secret (p. 38) to the District Judge. It is this Judge, who has now been sustained in his exercise of "discretion", made the focal point of the Court's affirmance opinion.

Perhaps it is pertinent here, that, in the Text of the advisory manual, prepared by the Committee on Federal Courts of the Bar Association, furnished for guidance to prospective applicants and respondents by the Clerk's office of this Court, the following appears:

> "The oral argument is always of great importance. Indeed, the 2nd Circuit is currently the only Federal Court of Appeals which permits oral argument in every case before it. For the appellant to forego oral argument is usually considered by the Judges as a confession of the weakness of the appeal. The 2nd Circuit does not encourage submission without argument. The Court will listen to one side if the other submits. Only 2% of the cases are submitted; a smaller percentage of submissions than in any Court, except the United States Supreme Court.
>
> "The importanfe of oral argument is emphasized by the fact that in about 75% of the arguments, the case is finally decided in accordance with the impression which the Judges have as they leave the Bench."

Petitioner submits that the total circumstances (U.S. v. Zerilli, (1971) 328 F.Supp 706), -of the personal, mute appearance of Roy Cohn at the counsel table, on February 19, (the day of hearing of this appeal), the silence of the Bench Panel at hearing, and in Opinion, on the aforecited corrupt practices of adversary counsel, and the Bench's

silence in presence of a motion to strike, which is authorized by Rule, as to the most rebukable affronts by affidavit, and Briefs, submitted to this High Court, while entering its severe criticisms of plaintiff's conduct of its case below, and otherwise making, what must be viewed, in the light of the Court's liberal opinions, as generally, nit-picking attacks upon appellant's legal exercise. Filing its Notice of Appeal has left appellant in a state of lack of confidence, and a state approximating that, contemplated by Congress as, when recently amending Section 455 of the Judiciary Law, on December 5, 1974, that statute now would require that Federal Judges, at all levels of jurisdiction, withdraw on their own initiative, when it develops that, apart from the reality of justice, the more vital "appearance of justice" seems absent to the litigant (p. 46-7).

This is the more so, because <u>universally</u>, the Courts, and the highest authorities in text, and case law, have held that one's <u>day in Court</u> is paramount; and that every benefit of any doubt should be resolved in favor of a day in Court, and against default.

The plaintiff feels that there is, here, no room for discretionary exercise in presence of the one issue, due process.

The plaintiff, seeking the protections for the ministration of Justice, provided by the Congress, has now been twice denied its day in Court, for proven malefactors,-in both Courts, as well as in commerce.

Petitioner feels,and submits,that the defendant News, Inc., particularly, should have been compelled to surrender that original key document, the Contract of Acquisition of October 15, 1963, for the Court's inspection as ordered; an agreement directly and basically substantiating the main allegations of plaintiff's Complaint as to the defendant News, Inc.'s monopoly market, and its plan and scheme to preserve and perpetuate it for a ten-year period; prepared by the self-same contriving attorneys before this Court and the District Court, defending against this 90-million dollar suit; and that defendant News, Inc. should have been compelled to surrender it before this plaintiff was declared in "default", for withholding answering papers on summary judgment to this defendant, and to which Answer, that document was essential. Petitioner hoped that this Court would enforce that priority, on appeal, upholding respect for the Court below against defiant malefactors of wealth (p.5).

THE OPINION AND THE POINTS OF LAW

The Opinion as published, opens with a statement of the appeal, as from a District Judge's Order, which, simultaneously coupled denial of recusal, and grant of summary judgment against the recuser. It omits, that the Judge on his own motion, with no demand from adversaries, took plaintiff's "default", and dismissed "for lack of prosecution" thereon.

The Opinion adds further in this coupled relation, that the District Judge, by his writing of June 2, wherein he admitted dealing judicially with two such inconsistent judicial processes, was thereby giving plaintiff an opportunity(?) to file answering papers; to which he presumably would "give full attention" also. We submit that the basic rule of physics, by which two things cannot occupy the same place at the same time, analogously and most compellingly, here applies in all its mutually exclusionary force.

Our Main Brief's Point I covered the contention of the legal impossibility of such a simultaneous judicial treatment. The footnote #5 of the Opinion would squarely contradict that, while maintaining plaintiff's having

"wholly failed" to establish "a personal bias". Petitioner submits that ultimate establishment of such "bias" is beside the point; for, in addition, the Judge found the affidavit, and application, (itself authorized by a priority statute), "IN GOOD FAITH."

But in Bradley v. School Bd., 324 F.Supp 439, the Court held:

> "When a recusal motion lacks the statutory required support, a Judge must give it due consideration. For any such motion presented in good faith, indicates a fear on party's part that this trial may be conducted without full regard for his rights and interests."

And there is no question that the Judge extraneously brought plaintiff's, and its attorney's personal veracity into issue; and it should be also noted here, that the present Opinion has adopted, in its support, one of the key misstatements of adversary, as to the crucial events of May 29. On that day, the Judge was notified, not, that plaintiff "was filing", but already "had filed" its affidavit in recusal.

On this most suspicious set of events, investigation of the circumstances, also, in vain, was requested.

The Opinion, footnote No. 5, citing the statute, 144, reads it as requiring suspension, "only where a sufficient affidavit has been filed". But that itself required a judicial determination; and it were hoped that the period of determination, which rests with the Judge, were brief; in any event certainly requiring suspension of adjudication in the meantime, in the nature of things, (if the statute is not to be reduced to a weapon in the hands of the recused). This Court in Rosen v. Sugarman, 357 F(2) 794, at 797, made that clear, in its own adoption with approval, of a most relevant quote:

> "The very special challenging and often sensational charge of partiality in the administration of justice, which is initiated by a formal affidavit of prejudice against a judge should receive final adjudication at first opportunity if only in the interest of public confidence in the courts. Moreover, a trial is not likely to proceed in a very satisfactory way if an unsettled claim of judicial bias is an ever present source of tension and irritation. Only a final ruling of the matter by a disinterested higher court before trial can dispel the unwholesome aura...this postponement of decision hurts the administration of justice, even though the Court reserves the right to pass upon the matter after trial...The affidavit of prejudice has already challenged the judge in the most personal way imaginable."

Thus, in waiting upon the Court, to determine recusal first, Petitioner followed the highest authorities, including this Court; which hold that the first obligatory thing, at the very "outset" before any further judicial action is taken, by the District Judge, is to determine "sufficiency" (which includes "timeliness"). Bradley v. School Board, 324 F.Supp. 439, treating with Sec. 144, citing Beyer v. U.S., 255 U.S. 22; Hodgson v. Liquor, 444 F(2) 1344,8,citing the Supreme Court in Berger v. U.S., Rosen v. Sugarman, ante; De Rau v. Killetts, CCA-6 1925____ (f2)_____ (also in point strongly).

Under these circumstances, petitioner submits, plaintiff was in the rightful position, which FRCP 56f warranted: not to be ready with any affidavits, in answering a claim for summary judgment, until the priority issue was first determined.

In some conditions, default judgments are vacatable as matter of right and law. Gen Tel v. Gen Tel Ans., 277 F(2) 919.

In any event, appellant was also entitled to an absolute right of appeal, where recusance was a substantive issue (an issue of due process) (Holt v. Virginia, 381 U.S. 131; also Tumey v. Ohio, 273 U.S. 510.), that had to be fully reviewed, as a part of the final judgment or order, on appeal,

and not to be collaterally treated, or summarily by a mere footnote (5). (See Koner v. Hoffman, 212 F(2) 211; Hurd v. Letts, 152 F(2) 120.) So far is this an independently reviewable determination of the District Judge, that, where an irreparability element is present, independent mandamus writ lies in the Circuit Court, even before any final determination of the action. (Re: Lisman,(CA-2) 89 F.(2) 898).

No "final" appeal review after default, and with only a unilateral unopposed submission, was legally possible, or noticeable within the established definition of "finality" for the purposes of appeal (Sec. 1291, U.S.C. Title 28).

Rule 54 FRCP defines "judgment" as used in these rules "to include any order from which an appeal lies", as well.

Under Sec. 1291, Title 28, U.S.C., finality for appeal purposes excludes a default judgment as appealable paper. So authoritatively held, in McNutt v. Cardox, (also a treble-damages case in Sherman and Clayton Anti Trust violation (CA-6, 1964 _____F(2)_____):

> "In criminal as well as in civil, judgment is final for the purposes of appeal 'when it terminates the litigation...on merits' and 'leaves nothing to be done but to enforce by execution what has been determined. Berman v. U.S., 302 U.S. 212, 213, citing also diBella v. U.S., 369 U.S. 121, 124."

In Hopkins v. McClure, 148 F(2) 67, the Court held on an appeal, from an order denying a motion to vacate a default judgment, that the issues on appeal, are as broad as the scope of the attack made, in the notice of motion to vacate. Petitioner was most inclusive, in both notice of motion and notice of appeal, without need of amendment.

Napier v. Delaware (1955 CA-2) 223 F(2) 28, in this Court, defines the appealable paper, as the final one, that one which follows the application of Rule 59 FRCP as the outcome upon such motion.

Weedon v. Gaden, _____F(2)____CA (Dist. of Col. 1968), held that an order denying an application to vacate default judgment was "clearly final and appealable".

Perhaps the leading case in further definition of Sec. 1291 upon the subject of the only "final" appealable paper is Cohen v. Beneficial, 337 U.S. 541:

> "The purpose is to combine in one review all the stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.
>
> "The effect of the statute is to disallow appeal from the decision which is tentative, informal or incomplete. Appeal gives the upper Court power of review, not of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal..."

That petitioner should be so stringently dealt with, on matter of days, where the Opinion concedes that anti-trust cases "were the least likely candidates for summary judgment", and which format was only to be used as an "issue-focussing" device (pp. 11-12), instead of a Pre-Trial Memorandum, runs counter to the entirely liberal attitude held by the highest Courts to be a matter of judicial policy: This Court's cited cases are in point here.

This Court cites petitioner's leading case, Foman v. Davis, 371 U.S.; and its refusal to give petitioner the benefit thereof, rotates around a matter of mere days. On the other hand, the cases cited by the Opinion (p.3), are denials of motions for 60(b) relief which came long after the final order, even a year or more. We refer without dispute to the Hines, Wagner, Sampson cases, et al, of the Opinion, but which, however, have no bearing on petitioner's prompt motion.

Petitioner's motion to vacate came within the 10-day, 59(e), (FRCP) 4a Court Rule. Notice of our intention, to vacate by motion, the default judgment came in a mere six days after ex parte entry of that "judgment". Our motion was made returnable within the rules, on July 3rd; and

petitioner's necessarily more voluminous merits-affidavit was served, as per notice, well before the noticed return date; and it is submitted that the 10-day rule is governed by the date of the service of Notice of Motion; and the papers were duly received and filed, with no objection or rejection registered by anyone.

Certainly, in the light of the Foman Supreme Court case (p.3), further strait-jacket criticism of petitioner's claim of the 59(e) compliance motion seems out of order, especially in the presence of the Supreme Court's language, as adopted in U.S. v. Ramos, 413 F(2) 743:

> "Since the rules are to be liberally construed, exceptions should be allowed when circumstances clearly record that a party intended to appeal from a final judgment as well as from the order denying a motion (Foman v. Davis, 371 U.S. 178...)";

And, as used by the Supreme Court itself, when the same technical question of 60(b) v. 59(e) arose, as on this appeal:

> "It is too late in the day, and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."

And it was in the spirit of that decision that petitioner served its amended notice of appeal as it states, not to establish a right of appeal thereby, but only to leave defendant, clear, as to petitioner's original intent, and well in advance of the appeal, so as to "not mislead and prejudice the respondent", and so that the notice of motion and appeal,

> "Taking the two.....together, petitioner's intention to seek review of both dismissal and denial was MANIFEST."

Petitioner's Notice of Appeal of July 29 and Notice of Motion dated June 17, and the laconic decision of July 3, 1975, alike uniformly and clearly indicate that the movant's and appellant's intent was to claim, as basis for relief, denial of due process, both by the simultaneous denial of recusal with abrupt grant of summary judgment to defendants, and the entry of judgment by surprise without 3-day advance notice required therefor to this plaintiff. 60(b) was invoked, not for its items (1)(2)(3) which lay within the discretionary area, but for those sub-divisions, dealing with original voidness (subd. 4), i.e. due process; and so far as "suprise" goes, the other element named, it was the surprise of a decision simultaneously

containing a treatment of recusance, and a grant of a default of judgment, with dismissal for lack of prosecution, in violation of due process.

As the record stands now, there is no dispute, but virtual admission of the sworn key facts as alleged, of defendants' concerted wrong-doing in this case (p. 40); which is of great public interest, involving the deprival of the 8 million population of New York City of a needed competent newspaper.

Petitioner submits further, that, while it is being, by Opinion, riveted to compliance with Rule "60(b)", the record shows that the defendants have, in the conduct of their defense before the Court below, and of their side of this appeal, displayed an affronting indifference to Rules and orders of the Courts, and to substantive statutes, essentially also going to due process issue. Particularly, for example, sections, FRCP 56(e) and (g), of a most fundamental nature, barred the District Judge from receiving at all, attorneys' affidavits as the exclusive predicates for claim to summary judgment.

The District Judge was also in sharp violation of this Court's important admonition to all District Judges

of October 27, 1975, copy of which appears in our Main Brief at p.77, relative to premature grants of summary judgment.

On the other hand, a mere nominal omission of the mention of the Rule, 59(e), while complying with its requirements, was deemed fatal by the Opinion, to petitioner's entire appeal.

Petitioner submits that it was a matter of comparative ease, for this Court to allow that the District Judge, in exercise of discretion, when extending the date for trial to June 16 from June 9, 1975, could easily have extended petitioner's time to file answering affidavits in opposition, such as were filed on June 17, instead of finding this plaintiff "had utterly failed to make such a showing" (p.3).

The Court dealt with the recusal situation footnotewise, and showed no concern for our insistent demand for investigation of the Judge's conduct, while making a veracity attack on plaintiff's attorney in connection with the whereabouts of the filed affidavit in recusal, which had disappeared from the Clerk's office.

The direct personal interest in this outcome, of the defendants' attorneys of record, must be deemed an element

in explaining the fraudulent submissions to this Court and their defiance of the Court's order, the implied assistance rendered by Roy Cohn in his direct approach to the Trial Judge,--all these facts of record have gone unnoted in this Court's Opinion; nor were any of the counsel hailed before this Court for appropriate rebuke of their corrupt conduct or indifference before this tribunal. Moreover, these wealthy co-defendants truly defaulted on this appeal, with no briefs at all and the threadbare papers filed late, and sitting out the case, while they are permitted to prevail also on this appeal.

Petitioner had made a motion duly referred to this Panel, to strike defendants' Briefs, for frauds upon the Court and use of scandalous material in attack upon this plaintiff's attorney. The Opinion offers no concern, or decision thereon.

This Panel is now asked to withdraw, in the "presence of a divided court," and the other circumstances under the "appearance of justice" doctrine; now recently embodied into law, as of December 5, 1974. While petitioner asked this Court, in its Main Brief (pp. 47-9), that it consider that amended Section as presenting a matter of novel

impression as to Judge Frankel, without avail, petitioner feeling that the "appearance of justice" is absent, and so as to leave plaintiff without confidence, that this petition can receive its due and just reception. Petitioner now raises this as matter of law, and necessity in justice, and under Congressional imperative.

We ask, in the alternative, that this question, or that, and any other question desired, be certified by this Court to the Supreme Court in order that the confidence of this appellant may be restored in such manner:-

"Whether a party's default may be taken, or any other decision may be made, against one for his failure to submit answering papers on pending motion for summary judgment, by a District Judge, while that party has already, on file with him, an application in recusance, undetermined and concededly filed in good faith?

Whether a default judgment of a District Court, entered on a motion for summary judgment, unilaterally presented, is a final disposition, for appeal purposes to the Court of Appeals under Section 1291 U.S.C. 28?

WHEREFORE, upon the grounds stated, your petitioner prays for the Court's grant of relief as set forth in the alternative, at the head of the petition.

Respectfully submitted,

ROBERT W. FARRELL

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration.

Robert W Farrell

ROBERT W. FARRELL
Attorney for Petitioner

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAILY MIRROR,
Plaintiff-appellant

- against -

NEW YORK NEWS,
Defendant-Respondents.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York
That on the 14th *day of* April *19* 76 *at* 220 East 42nd Street, New York New York
deponent served the annexed Petition *upon*
Townley Updike Carter & Rodgers
the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 14th
day of April *19* 76

Robert T. Grin

JAMES A. STEELE

ROBERT T. GRIN
NOTARY PUBLIC, State of New York
No. 31-0416920
Qualified in New York County
Commission Expires March 30, 1977